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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH BROWN,

Defendant and Appellant.

2d Crim. No. B209689
(Super. Ct. No. BA283891)
(Los Angeles County)

Kenneth Brown appeals the judgment entered after he was convicted by jury on two counts each of attempted willful, deliberate, premeditated murder (Pen. Code, §§ 664/187, subd. (a));¹ assault with a firearm (§ 245, subd. (a)(2)); and shooting from a motor vehicle (§ 12034, subd. (c)); and one count each of possession of a firearm by a felon (§ 12021, subd. (a)(1)) and possession of an assault weapon (§ 12280, subd. (b)). On the counts for attempted murder, assault with a firearm, and shooting from a motor vehicle, the jury found true allegations that appellant (1) committed the crimes for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(A)); (2) was armed with a firearm in committing the offenses (§ 12022, subd. (a)(1)); and (3) personally used a firearm (§ 12022.53, subds. (b)-(e)). Also found true were allegations that appellant personally

¹ All further undesignated statutory references are to the Penal Code.

inflicted great bodily injury in committing the assaults (§ 12022.7, subd. (a)).² The trial court sentenced him to a total state prison term of life with the possibility of parole plus concurrent terms of 25 years to life on each of the attempted murder counts. He contends (1) he received ineffective assistance of counsel; (2) the court erred in admitting a videotaped interview he gave shortly before the crimes were committed; (3) the court erred in allowing an expert to offer an opinion as to the meaning of his tattoos; and (4) the evidence is insufficient to support his convictions. He also alleges cumulative error. We affirm.³

STATEMENT OF FACTS

The Quincy Jones Video

At about 1:00 p.m. on May 19, 2005, Quincy Jones III, a movie and music producer, began conducting videotaped interviews of people who were interested in appearing in a documentary film on gang life in the Los Angeles area. Appellant and codefendant Akili Williams were among those who participated in the interviews, which took place in an alley by a liquor store near Sixth Street and Florence Avenue. Both appellant and Williams were known members of the Rollin' 60's Neighborhood Crips street gang (the Rollin' 60's). Appellant was depicted in various videotaped scenes wearing a hat, while Williams was depicted wearing a blue bandana on his face, a shirt

² Appellant was initially tried along with codefendant Akili Williams, who was also named in the counts for attempted murder, assault with a firearm, and shooting from a motor vehicle. Williams was convicted on all counts, and we subsequently affirmed the judgment against him in an unpublished opinion. (*People v. Williams* (Mar. 18, 2009, B199699).) In that case, the jury found appellant guilty of being a felon in possession of a firearm and possessing an assault weapon, but deadlocked on the counts of attempted murder, assault with a firearm, and shooting from a motor vehicle. The court thereafter declared a mistrial as to those counts. Following a retrial, appellant was found guilty on all the remaining counts and the corresponding gang, firearm, and great bodily injury allegations were found true.

³ Appellant personally submitted a supplemental brief raising numerous issues. Although these papers were accepted for filing, it is well established that criminal defendants "have no right personally to supplement or supersede counsel's briefs and arguments on the merits of their appeals. [Citations.]" (*In re Barnett* (2003) 31 Cal.4th 466, 473.) "Thus, all appellate motions and briefs must be prepared and filed by counsel and may not be submitted pro se. [Citation.]" (*Ibid.*) "Any other pro se document offered in an appeal 'will be returned unfiled' [citation], or, if mistakenly filed, will be stricken from the docket [citation]." (*Id.* at p. 474, fn. omitted.)

with a rhinoceros on it, and a Seattle Mariners baseball cap.

Jones testified that filming finished around 5:40 or 5:45 p.m. He acknowledged previously testifying the filming stopped anywhere between 5:15 and 5:45 p.m., but later realized he had been mistaken. Jones believed he was "probably" the last person to leave the set that day, which may have been around 6:00 p.m. or shortly thereafter. He also believed it was possible that he stayed by the liquor store with appellant and Williams until sometime before 7:00 p.m. He felt it was likely that appellant was with him at 6:05 p.m., but he was not certain. He knew, however, that appellant and Williams were with him in the liquor store's parking lot at 5:30 p.m.

The jury was shown appellant's videotaped interview and was given a transcript of the dialogue. The transcript refers to appellant stating his gang name "Cacci Blue," then asking that it be edited out. Appellant also said "[y]ou have to be heated everywhere you go" because "I know the next motherfucker is gonna have his." When asked if he had anything to say to "White America," appellant said, "if you ask me, the white motherfuckers the one's [*sic*] who started that shit. I mean, not started gangs, . . . but it wasn't no tripping, niggers wasn't killing niggers. You had motherfucking police officers go write up a hood and strike out another hood so them niggers come by think them niggers did it go back and shoot them niggers. You know what I'm saying? They started all this shit . . . and now it's out of hand. There ain't shit they can do, . . . but they trying to fuck us over." Appellant added: "This gangbanging shit . . . [*is*] fun at some times, at some times it's not fun. When a nigger's got a homie . . . laid out, . . . we got to go and lay some more shit down." At the conclusion of the interview, appellant expressed his hope "that motherfucking blacks could get together. . . . But like I said, the police and white motherfuckers fuck all that up."

Los Angeles Police Officer David Ross,⁴ a prosecution gang expert, explained portions of the video for the jury. For example, "heated" meant carrying a gun,

⁴ All police officers and detectives hereinafter referred to are from the Los Angeles Police Department.

while to "blast" meant to shoot someone. Officer Ross identified Williams as the person depicted in the video wearing a white t-shirt with a rhinoceros on it, a blue bandana, a cross, and a Seattle Mariners cap. The officer was able to identify Williams because he had seen another video in which Williams had identified himself as "Baby Chico" from the Rollin' 60's. The Seattle Mariners' logo was the most common and traditional form of gang attire for the Rollin' 60's, with the "S" representing the "Sixties." Two other Rollin' 60's members were also depicted in the video.

The Uncharged Shootings of Brooks and DePillars

At about 3:40 p.m. the same day, Joe Nash and Derrick Boston, both members of the Eight-Trey Gangster Crips (Eight-Trey) street gang, committed a drive-by shooting at a residence in an area of South Los Angeles that was controlled by the gang's main rival, the Rollin' 60's. Michael DePillars, a Rollin' 60's member known as "Baby Cacci Blue," was sitting on the front porch, while Usseff Brooks was just inside the open front door. Brooks was struck, but DePillars was not. The location of the shooting was less than a half mile away from the liquor store where the video was being filmed. Nash was the driver, and Boston was purportedly the gunman.

The Charged Shootings of Boston and Richards

At about 6:00 p.m. that same day, Boston, Eight-Trey associate Willie "Baby G-Ride" Richard, and Deonta D. were at 74th and Denker Streets, which is about a mile from the Brooks and DePillars shooting, when a white car carrying two Black males drove by.⁵ The driver of the car had braided hair. The men in the car asked, "What's up?" and the driver flashed a gang sign. When the car returned shortly thereafter, Deonta heard gunfire and saw two guns being fired from the car. Richard saw Boston shot, then turned away and was shot in the chest. The men all ran away. A neighbor who had just parked in her driveway saw the victims standing outside, heard the gunshots, and called

⁵ Deonta testified that the car was white, while Richard identified it as a yellow, beige, or white four-door Toyota or Honda.

911. Boston's brother Duane, who witnessed the incident, called 911 and reported seeing people with the guns drive away in a white two-door Acura driven by a Black man.

Officer Guillermo Mixer and his partner were in the process of responding to another shooting call when they saw a white Acura with no license plates and a temporary registration sticker on the back window. The Acura's two male occupants appeared nervous as they passed Officer Mixer's unmarked car. As Officer Mixer pulled back up alongside the Acura, he saw two Black men with cornrow braids sitting in the driver and front passenger seats. The officer noticed a marked patrol car following the Acura, then continued driving with his partner toward their original call.

Officer Ruben Martinez and his partner were on patrol in South Los Angeles when they received a dispatch call about a white Acura that had been involved in a nearby shooting. Shortly thereafter, the officers saw a white Acura occupied by two Black males and began following it. The Acura came to a stop, and Officer Martinez and his partner pulled up behind it. When Officer Martinez began to exit his vehicle, the Acura took off. The officers resumed their pursuit. Shortly thereafter, the front seat passenger jumped out of the Acura and ran inside a nearby building while holding one of his hands at his waist. The officers activated their lights and sirens and continued pursuing the Acura as it headed eastbound on Florence Avenue. The Acura eventually stopped and the driver got out, lifted his shirt, and yelled, "I don't have anything, I didn't do anything." The driver complied with the officers' commands to get on the ground. As the officers were waiting for backup, however, the driver got up and ran away.

In the meantime, Officer Mixer and his partner heard on the radio that a white Acura had been involved in a shooting on Denker Street. The officers made a U-turn and went looking for the Acura they had recently seen. After they found it and discovered that the driver and passenger had escaped, they helped set up a perimeter. The driver, whom the officers identified as Williams, was captured several minutes later. Shortly thereafter, Deonta identified the Acura as the car that had been involved in the drive-by shooting.

When Officer Mixer returned to the police station, he told another officer what had happened and gave a physical description of the passenger who had fled. Based on what Officer Mixer told him, the other officer thought the passenger might have been appellant. After Officer Mixer looked at photographs of Rollin' 60's members, he identified appellant as the passenger in the Acura. Appellant lived about a block away from where the Acura was stopped.

Detective Michael Lorenz interviewed Richard at the hospital along with Detective Juneau. Detective Lorenz testified that Richard told him he was walking down the street with Boston when a late 1980's model white Acura Integra drove by and someone yelled, "Fuck Eight-Trey, you all got to move." About 30 seconds later, the Acura returned and the front seat passenger shot at them with a blue steel semiautomatic handgun. Richard described the Acura's occupants as two Black males with braided hair and wearing white T-shirts.

Richard gave a virtually identical account of the incident and description of the suspects when he was interviewed two days later by Detectives Jeff Martin and John Ayala. Richard also identified Williams and appellant from photographs. In identifying Williams as the driver, Richard noted that "his face is clear as daylight." He recognized appellant as the passenger "because that was the one who pulled the trigger." Detective Martin testified he had no doubt that Richard had identified appellant as the shooter.

Richard denied making the statements attributed to him by Detectives Lorenz and Martin. According to Richard, he told the detectives to "Get the fuck up out of here," and said he could not identify anyone. Detective Martin testified that Richard told him he was being pressured by gang members to not testify, and that they wanted paperwork to prove he was not a snitch. Officer Ross, the prosecution's gang expert, explained that gang members are usually reluctant to testify and often recant incriminating statements to avoid being beaten or killed. Richard denied that appellant or anyone else had threatened him.

Williams was the registered owner of the Acura, and appellant's cell phone

was found on the front passenger seat.⁶ Also recovered from inside the vehicle were a hat, a Seattle Mariners baseball cap, school books and a notebook containing gang writings, and photographs of Rollin' 60's members.

Expert Gang Testimony

Prosecution gang expert Officer Ross testified that the Rollin' 60's committed a variety of crimes, including drive-by shootings, murders, bank robberies, witness intimidation, and similar crimes, as their primary activities. It was also stipulated that the gang engaged in a pattern of criminal gang activity. In the officer's opinion, appellant was a member of the Rollin' 60's known as "Lil Cacci Blue." Lil Cacci Blue referred to "khaki," but omitted the letter "k" which was used in conjunction with the letter "c" to signify "Crip killer." DePillars was known as "Cacci Blue," or "Baby Cacci Blue." Williams was also a known Rollin' 60's member. Appellant hung out with other Rollin' 60's members, including DePillars and Williams.

Officer Ross testified that a gang member who was a crime victim would often retaliate by committing the same crime against the perpetrator or his associates. A gang member who shared another member's name and acted as his mentor had a greater incentive to "defend the honor" of the mentee by retaliating.

The distance between the two shootings and the site of the videotaping was less than a half mile. Officer Ross believed appellant would likely have known about the Brooks and DePillars shootings because such news travels quickly by cell phone. The officer opined that the Boston and Richard shootings were in retaliation for the Brooks and DePillars shootings. Officer Ross agreed with the hypothetical that the Boston and

⁶ The cell phone was subscribed to by "Kenny Brown," of "7032 4th Avenue" in Los Angeles, from April 7, 2003, through June 22, 2005. Through the trial, appellant's address was given as 7032 *Third* Avenue. Appellant suggests that this discrepancy proves the cell phone was not his, yet he overlooks the fact that the phone was also programmed to reflect that it belonged to "Cacci." The court also noted the cell phone looks like the one appellant is seen holding in the Jones video. Moreover, the prosecutor referred to the discrepancy during argument and noted that the two addresses were only one block away from each other.

Richard shootings were committed for the benefit of, at the direction of, or in association with the Rollin' 60's because the crime enhanced their reputation for violence and elevated the status of the gunman and driver.

The Eight Treys were a criminal street gang with between 400 and 500 members. Boston was an admitted Eight Trey member known as "Lil Wicked." Richard was also an admitted member of the gang, known as "G-Ride." Eight Trey and Rollin' 60's were mortal enemies. Officer Richard Mendoza, a gang expert, opined that the Brooks and DePillars shootings were committed by and for the benefit of Eight Trey.

Appellant's Neck Tattoos

The jury was shown a photograph depicting two tattoos on appellant's neck. Mandarin interpreter Albert Houg testified that the tattoos were Mandarin characters. One signified "fanatic or in the sense almost like crazy." The second tattoo likely meant "cut in the sense like cutting the head" with a weapon such as a knife. Houg did not know whether the tattoos were made at the same time, and did not believe they had a combined meaning. He explained that "for different people, different culture, it might have different meaning." Houg did not know whether appellant knew the meaning of the tattoos.

The Firearm Charges

On May 25, 2005, an SKS assault rifle was recovered from a bedroom in appellant's residence at 7032 South Third Avenue in Los Angeles. The rifle was loaded with 9-millimeter cartridges that were originally designed for military use. The rifle had also been modified to accept a high-capacity magazine.

DISCUSSION

I.

Ineffective Assistance of Counsel

Appellant contends his attorney in the second trial, Ronald White, provided constitutionally ineffective assistance because he had a disabling conflict of interest. Appellant also complains that White failed to call three witnesses who testified in the first

trial and did not pursue a third party culpability defense. None of these claims has merit.

A.

Background

On January 10, 2007, after the court declared a mistrial as to appellant on the counts of attempted murder, assault with a firearm, and shooting from a motor vehicle, appellant retained attorney White to represent him on retrial. Appellant's retrial commenced on October 26, 2007. Following appellant's conviction, White declared a conflict of interest on the ground that appellant had informed him he wanted to file a motion for new trial alleging ineffective assistance of counsel. The alternate public defender was appointed to represent appellant, then also declared a conflict. Privately retained attorney Mark Montpas represented appellant for the remainder of the trial court proceedings.

In a new trial motion filed by Montpas, appellant alleged White had a conflict of interest because he had also represented Nash in the appeal of his conviction for the Brooks and DePillars shootings.⁷ The motion asserted that White's dual representation created an "appearance of impropriety" and gave rise to an "indirect" conflict that should have barred White from representing appellant. It was also argued that White should have disclosed the conflict and obtained a waiver from appellant.

In hearing the motion, the court asked how White or Nash might have benefitted from appellant being convicted. Montpas responded, "If Mr. White has represented Mr. Nash obviously before he was representing [appellant], you know, it is paying back [appellant] for what he did against Mr. Nash's group or interest, so to speak" The court concluded that while it may have been "uncomfortable" for White to represent both Nash and appellant, doing so did not create a conflict of interest.

The motion also faulted White for failing to call four alibi witnesses who

⁷ Our court docket reflects that White substituted in as Nash's appellate counsel on November 20, 2006. Nash's conviction was affirmed by Division Three of this district in an unpublished opinion filed on October 18, 2007 (*People v. Nash*, B191900), and the remittitur issued on January 24, 2008.

testified during the first trial. In its opposition, the prosecutor noted that the first two alibi witnesses had given testimony that was adverse to appellant's position. Witness Johnny Green claimed appellant was at a nearby location wearing a hat that was found in the Acura, and witness Monte Kelly testified that he saw appellant in the front seat of the white Acura before the shooting wearing the very same hat. The prosecution also argued that witness Julius Johnson was "all over the page" and that he did not "know how he got there and he didn't know where he was before that." Johnson first testified that appellant arrived at his house on the day of the shooting sometime between 5:30 and 6:30 p.m., then said it was not later than 6:45 p.m. This testimony not only gave appellant enough time to commit the shooting at 6:05 p.m., but also would have conflicted with appellant's claim that he was at the location of the video shoot until about 7:00 p.m.

The court found that White did not have a conflict, but rather "only an unusual situation which in logic would have come out in their private attorney-client conversations." The court also noted that if the jury had found any of the four alibi witnesses who testified at the first trial credible, either appellant, Williams, or both of them would have been found not guilty. The court concluded that White's decision to refrain from calling the witnesses therefore did not amount to ineffective assistance of counsel. Appellant's motion was denied.

B.

Analysis

1.

Conflict

Appellant asserts that White had a conflict of interest because he represented Nash in the appeal of his convictions for the Brooks and DePillars shootings. We conclude otherwise.

A defendant has state and federal constitutional rights to conflict-free representation. (U.S. Const., 6th Amend; Cal. Const., art. I, § 15; *People v. Ramirez* (2006) 39 Cal.4th 398, 427.) "It has long been held that under both Constitutions, a

defendant is deprived of his or her constitutional right to the assistance of counsel in certain circumstances when, despite the physical presence of a defense attorney at trial, that attorney labored under a conflict of interest that compromised his or her loyalty to the defendant.' [Citation.] 'As a general proposition, such conflicts "embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or his own interests. [Citation.]'" [Citation.]" (*People v. Doolin* (2009) 45 Cal.4th 390, 417.)

When an actual conflict of interest exists, prejudice is presumed. To make this showing, the defendant must demonstrate that his attorney actively represented conflicting interests and had an actual conflict of interest that adversely affected his performance. (*People v. Ramirez, supra*, 39 Cal.4th at p. 427.)

Appellant fails to establish that White's dual representation of appellant and Nash created an actual or potential conflict of interest.⁸ He claims White had a conflict "akin to situations where counsel represents the defendant and a witness" because "the facts of [Nash] were inextricably bound to the issues to be aired and resolved at appellant's trial," yet he never explains how this is so. The only evidence from Nash's appeal that was arguably relevant to this case is the fact that the crimes of which Nash was convicted were actually committed. Nash was not appellant's codefendant, nor was he an actual or potential witness at his trial. Moreover, there is no indication that White's representation of Nash rendered him privy to confidential information that might have interfered with his ability to effectively represent appellant. Trial counsel's assertion that White may have been motivated to help secure appellant's conviction as "payback" for retaliating against Nash's gang is without any basis in fact or reason.

We also reject appellant's claim that the trial court effectively imposed a burden on him to question White regarding any potential conflicts. The court merely

⁸ The record belies appellant's claim that White acknowledged the conflict of which he now complains. White merely stated that a conflict existed because appellant had indicated he wanted to file a new trial motion alleging ineffective assistance.

said, "I would think it would be very difficult to have talked about the case without Mr. White having revealed the fact that he had some prior association with the case." Appellant's assertion that no such conversation ever took place finds no evidentiary support in the record. While the court also said that a defendant has the opportunity to inquire about conflicts, its ruling is not based on that conclusion. Rather, the court simply found that no conflict existed. Appellant offers nothing of substance to undermine that finding.

2.

Failure to Call Witnesses and Present Third Party Culpability Defense

Appellant argues that White rendered ineffective assistance of counsel by failing to call three alibi witnesses who testified at the first trial.⁹ He also faults counsel for failing to pursue the theory that a third party committed the shootings with which he was charged. We reject each claim in turn.

To prevail on a claim of ineffective assistance of counsel, "" . . . a defendant must first show counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" [Citation.] [¶] Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' [Citation.] . . ." (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.) On direct appeal, a conviction cannot be reversed on the ground of ineffective assistance unless the record affirmatively demonstrates that counsel's complained of act

⁹ Appellant abandons trial counsel's claim as to one of the witnesses who testified at the first trial.

or omission had no rational tactical purpose. (*Id.* at p. 437.)

The record fails to disclose White's reasons for declining to act as appellant claims he should have. We do know, however, that White primarily pursued an alibi defense based on Jones's testimony. In light of this strategy, White had a legitimate tactical reason to refrain from calling Johnny Green, Monte Kelly, and Julius Johnson to testify in the second trial.

In the first trial, Green initially testified that he was at the filming location on the day of the shootings and that appellant was still there when Green left at about 5:45 or 6:00 p.m. He subsequently clarified, however, that he must have left no later than 5:50, because he had to pick up his girlfriend. Green also placed appellant with Williams, and vacillated between acknowledging that appellant was wearing a hat similar to the one found in the Acura and claiming he did not recognize the hat appellant was depicted wearing in a photograph taken that afternoon. He also had a credibility problem in that he claimed he had known appellant for several years and had called him to participate in the taping, yet also claimed he did not know appellant was a gang member. He admitted he did not tell anyone he could provide appellant with an alibi until about two weeks before he testified. At the conclusion of his testimony, he made it clear he did not know where appellant was at 6:05 p.m., the time the charged crimes took place. In light of this evidence, it cannot be said that White would be unable to provide a satisfactory explanation for his failure to call Green to testify in the second trial. Appellant's claim that White was ineffective in failing to call Green is therefore not cognizable on direct appeal. (*People v. Lucas, supra*, 12 Cal.4th at pp. 436-437.)

There were also legitimate tactical reasons for White to refrain from calling Monte Kelly and Julius Johnson. Kelly was unable to account for appellant's whereabouts at the time of the shootings, and placed him in the Acura with Williams shortly before the shootings took place. Kelly also had a credibility problem in that he claimed he did not know whether appellant was a member of the Rollin' 60's. Johnson was similarly unable to verify that appellant was with him when the shootings took place

at 6:05 p.m., and gave inconsistent testimony regarding the time that appellant actually arrived at his house that day. Johnson also said he had no reason to believe that appellant was a member of the Rollin' 60's, and claimed he had never heard of the gang. He acknowledged, however, that he had grown up with appellant in a neighborhood within the gang's territory. Because both Kelly and Johnson were unable to establish an alibi for appellant, and their testimony tended to undermine the alibi provided by a significantly more credible and persuasive witness, White had a legitimate tactical reason to refrain from calling them to testify at appellant's retrial. Appellant therefore fails to establish that White's failure to call these witnesses constitutes ineffective assistance of counsel. (*People v. Lucas, supra*, 12 Cal.4th at pp. 436-437.)

Appellant's claim that White was ineffective in failing to present a third party culpability defense is also unavailing. "' . . . [T]o be admissible, evidence of the culpability of a third party offered by a defendant to demonstrate that a reasonable doubt exists concerning his or her guilt, must link the third person either directly or circumstantially to the actual perpetration of the crime. In assessing an offer of proof relating to such evidence, the court must decide whether the evidence could raise a reasonable doubt as to defendant's guilt and whether it is substantially more prejudicial than probative under Evidence Code section 352. [Citations.]' [Citation.]" (*People v. McWhorter* (2009) 47 Cal.4th 318, 367-368.) "[T]he third-party evidence need not show "substantial proof of a probability" that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt.' [Citation.]" (*Id.* at p. 368.) However, "' . . . [t]he evidence must meet minimum standards of relevance: "evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." . . . [S]uch evidence is [also] subject to exclusion under Evidence Code section 352. [Citation.]' [Citation.]" (*Ibid.*)

Evidence presented in appellant's first trial established that his fingerprints

were not found in or on the Acura and that prints belonging to his half brother, Glen Pilart, had been lifted from the vehicle's exterior. When White sought to present the evidence of Pilart's fingerprints in the second trial, the court tentatively ruled that the evidence was insufficient to support a third party culpability defense. The court told White, however, to "[t]ry, if you need to, with your fingerprint expert and we'll see." The matter was never raised again.

Appellant complains that White "never followed up with the [fingerprint] expert and never revealed why not. However, in the first trial, where the fingerprint evidence was fully explored, the jury deadlocked with respect to appellant's guilt." According to appellant, "[n]o reasonable attorney would have abandoned a viable and credible opportunity of raising possible third-party culpability, or at least using the evidence to raise a reasonable doubt as to appellant's guilt."

We disagree with appellant's characterization of the record and his legal conclusion. As the People correctly note, the fingerprint evidence was not "fully explored" in the first trial. The jury merely heard that Pilart's prints had been found on the Acura. Appellant's attorney did not mention the fingerprint evidence in her opening statement or closing argument and instead focused on attacking Officer Mixer's identification of appellant. Appellant's implied assertion that the jury's deadlock was influenced by the fingerprint evidence is pure speculation. Appellant also speculates that White "never followed up" with his own fingerprint evidence. Perhaps White *did* confer with an expert, but simply did not receive any additional information that would warrant asking the court to revisit its tentative ruling excluding the fingerprint evidence, a ruling appellant does not challenge. Another possibility is that White discovered that Pilart had an incontrovertible alibi that would have precluded the jury from finding that he, and not appellant, was the shooter. Given the range of legitimate reasons White may have had for declining to pursue a defense that appellant's half brother was the shooter, we cannot conclude that White's failure to pursue the defense constitutes ineffective assistance of counsel. (*People v. Lucas, supra*, 12 Cal.4th at pp. 436-437.)

Even if White's failure to call Kelly, Johnson, and Green or to present purported third party culpability evidence amounted to deficient performance, appellant fails to demonstrate prejudice. Appellant merely speculates, as he did in addressing White's failure to present a third party culpability defense, that the testimony of Green, Kelly and Johnson in the first trial played a part in the jury's inability to reach a verdict. One could just as easily infer, as the court did in rejecting appellant's ineffective assistance claim, that the jury would have *acquitted* appellant had it believed the testimony of those witnesses. Moreover, we have already noted the reasons why that testimony did not aid appellant. As for White's failure to present a third party culpability defense, appellant fails to identify any available, admissible evidence that was not offered. Appellant also overlooks the compelling evidence of his guilt, which included eyewitness identifications by a police officer and one of his victims. Because appellant fails to show a reasonable probability that the result of the proceedings would have been different if White had called Green, Kelly and Johnson to testify and pursued a third party culpability defense, any error in failing to so act would be harmless. (*People v. Lucas*, *supra*, 12 Cal.4th at pp. 436-437; *Strickland v. Washington* (1984) 466 U.S. 668, 694.)

II.

Videotape Evidence

Appellant contends the court erred in admitting the Jones videotape because it was "unnecessary to prove any disputed issue, outrageously inflammatory, and so prejudicial that its admission deprived appellant of a fair trial and due process." We conclude that the video was properly admitted.

Background

Prior to the second trial, the prosecutor moved in limine to admit the Jones videotape. The prosecutor argued that the video, which was not available in the first trial, was relevant in that it contained admissions of his gang membership and depicted appellant wearing the "very distinctive" hat that was found in the Acura. After appellant opposed the tape on relevance grounds, the court noted that it also contained appellant's

admission that he was always "strapped," i.e., armed with a handgun.

When the matter was later revisited, the prosecutor offered that the videotape was relevant to prove the gang allegation and to impeach and rebut Jones's testimony. He added that appellant was depicted holding the cell phone found in the Acura after the shooting and is dressed the same as the shooter. The prosecutor further noted that appellant is shown associating with Williams, and that his identity was further proved by statements he made on the video. Appellant is also heard stating his motive for carrying a gun, and refers to shooting African Americans.¹⁰

Appellant argued at trial that the video should be excluded as more prejudicial than probative under Evidence Code section 352. He acknowledged, however, that parts of the video could be admissible to impeach Jones, and stated that he did not object to either showing the recording without any sound or editing it so that only certain statements would be admitted. He nevertheless objected to the tape in its entirety on foundational grounds, arguing that it was not clear exactly when the recording was made. He also objected to irrelevant statements in general and statements that were more prejudicial than probative, as well as statements by anyone other than appellant. He specifically challenged his statements regarding "White America" as irrelevant. Appellant also acknowledged that the tape might become admissible if he contested his gang membership. Until then, however, the tape with the sound portion would be subject to exclusion under Evidence Code section 352, except for his isolated references to being armed and "different things like that."

The prosecutor responded that the tape could be authenticated through Jones and other witnesses if necessary. He also argued that the People had to prove the gang allegation regardless of whether appellant contested it. The prosecutor also claimed that appellant's identification of himself on the tape as "Cacci Blue" was relevant in that "Baby Cacci Blue" was the moniker of DePillars, who had been shot at that day. Also

¹⁰ Boston and Richard are both African American.

relevant were appellant's statements regarding his commitment to gang life, his affiliation with other gang members, the fact that he carries a gun, and his recounting of the gang fights in which he has participated.

The court found that sufficient foundation had been laid for the video. The court noted that the hat appellant was depicted wearing and the cell phone he was holding resembled those found in the Acura, and concluded the tape was relevant in light of appellant's discussion of weapons and gang activity. Appellant's complaints about the video went to weight, not admissibility. The court sustained appellant's objection to the portion of the video depicting Williams, and indicated it would instruct the jury that statements made by anyone other than appellant were not offered for their truth.

Analysis

"Except as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, § 351.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; *People v. Carter* (2005) 36 Cal.4th 1114, 1166.) A statutory exception to the admission of relevant evidence is found in Evidence Code section 352, which gives the court the power to exclude evidence whose prejudicial effect outweighs its relevance. "For this purpose, 'prejudicial' is not synonymous with 'damaging,' but refers instead to evidence that "'uniquely tends to evoke an emotional bias against defendant'" without regard to its relevance on material issues. [Citations.]" (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) The type of prejudice Evidence Code section 352 is intended to avoid is the tendency to prejudge a person on the basis of extraneous factors, such as evidence that evokes an emotional bias against the defendant without regard to its relevance to material issues. (*Id.* at p. 1122.)

"The admission of videotape evidence is governed by Evidence Code section 352. [Citation.] The question the trial court must resolve is whether the prejudicial impact of the videotape outweighs its value in assisting the jury to understand and evaluate the other evidence presented in the case. [Citations.]" (*People v. Ibarra*

(2007) 151 Cal.App.4th 1145, 1150.) We review the trial court's ruling for an abuse of discretion. (*Ibid.*)

We conclude the court did not abuse its discretion in admitting the Jones video.¹¹ The evidence showed appellant shortly before the shooting wearing the hat that was found in the Acura and holding the cell phone that was recovered from the front passenger seat where the shooter had been sitting. The video also showed appellant with Williams, who was captured shortly after the shooting as he fled from the Acura of which he was the registered owner. The verbal portion of the tape was also relevant to establish that appellant was a member of the Rollin' 60's gang, that he always carried a gun so that he would be prepared to shoot rival gang members if necessary, and that he was committed to committing violence for the benefit of his gang. Appellant can also be heard identifying himself as "Cacci Blue," which is relevant to prove he had a motive to retaliate against those who shot his mentee "Baby Cacci Blue" DePillars. The presence of other gang members on the video further demonstrates appellant's commitment to his gang.

Appellant's comments regarding "White America," an unidentified gang member's remark, "I'm a Mexican killer," and the repeated references to the "N" word, are more problematic. Any comment that could be conceived as critical of a particular race has the potential to create the sort of emotional bias that Evidence Code section 352 is supposed to protect against. When considered in context, however, the likelihood that these comments would lead to such a bias is slight. While appellant essentially blamed "White America" for the proliferation of gangs, the substance of the statements was more

¹¹ We reject the People's claim that appellant forfeited his right to challenge the video on appeal by failing to raise in the trial court the specific objection he now raises on appeal. Appellant expressly asked the court to exclude the video pursuant to Evidence Code section 352. While defense counsel subsequently acknowledged that the tape might be admissible to impeach Jones and stated he would not be opposed to admitting the tape without the sound, counsel cannot be faulted for pursuing an alternative strategy in an effort to minimize the effect of the evidence after the court had indicated its intent to overrule his objection under Evidence Code section 352. Counsel also raised relevance and Evidence Code section 352 objections to appellant's statements regarding "White America." We therefore consider appellant's claim on the merits.

addressed to the police than to race in general. The comments were also relevant to prove and explain the reasons for appellant's entrenchment in the gang lifestyle. Moreover, the comments were relatively brief. The remark, "I'm a Mexican killer," was also brief and was not made by appellant. The repeated references to the "N" word, while undoubtedly offensive to some, are made by appellant in reference to his own race. On balance, it cannot be said the court abused its broad discretion in allowing the jury to see and hear all of appellant's interview.

We also reject appellant's claim that the admission of the video amounted to a violation of his due process rights. A due process violation occurs only if the jury could not draw any reasonable inferences from the challenged evidence, such that the trial is rendered fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384.) As we have explained, the jury could draw several inferences from the video that were relevant to prove a number of contested issues in the case. It necessarily follows that no due process violation occurred.

We also conclude that any error in admitting the video was harmless because it did not result in a miscarriage of justice. (Evid. Code, § 353, subd. (b).) The evidence against appellant was substantial. He was identified by one of his victims and a police officer, and his hat and phone were found in the car in which the crime was committed. Expert gang evidence established that appellant also had a strong motive to commit the crimes. Because it is not reasonably probable the result of the proceedings would have been different had the video been excluded, any error in its admission was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see also *People v. Harris* (2005) 37 Cal.4th 310, 336 [claims of error in applying the ordinary rules of evidence are subject to *Watson* standard of review].)

III.

Appellant's Tattoos

Appellant argues that the court erred in admitting evidence regarding the meaning of the two tattoos on his neck. He asserts that the evidence was admitted in

violation of Evidence Code section 1101, subdivision (a), and should in any event have been excluded under Evidence Code section 352. He also claims the evidence was admitted in violation of his due process rights.

We agree with the People that appellant forfeited these claims by failing to raise them below. In the trial court, appellant objected to the evidence on the ground it was speculative and irrelevant. He did not assert, as he does now, that the evidence was inadmissible propensity evidence, that it should have been excluded under section 352 of the Evidence Code, or that its admission would violate his right to due process. Because he did not make specific objections on the grounds he now raises, the claims are forfeited on appeal. (*People v. Partida* (2005) 37 Cal.4th 428, 434; *People v. Seijas* (2005) 36 Cal.4th 291, 301; Evid. Code, § 353.)¹²

In any event, appellant's claims lack merit. The challenged evidence is the testimony of a Mandarin interpreter regarding the meaning of two Chinese characters that are tattooed on appellant's neck. The translator testified that one character could mean "wild," "furious," and "a lot of other connotations similar to that." The other character means "to cut, to sever, to chop, to slash." The translator also stated that further context would be needed to determine what the symbols mean when paired together. The prosecutor asserted that this evidence was relevant in that it was an "admission that [appellant] has put on his body as to his attitude about life and his gang lifestyle." The court agreed: "I think a tattoo is very indicative of a purpose or intent, an attitude of an

¹² Appellant cites *People v. Clark* (1992) 3 Cal.4th 41, 126, for the proposition that a relevance objection is sufficient to preserve claims under Evidence Code sections 1101 and 352 when the objection is "'... made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility.' [Citation.]" According to appellant, his objection was made in such a way because "the trial court quite plainly interpreted the evidence as propensity evidence" This assertion merely begs the question it purports to answer. The rule appellant seeks to invoke only applies "'[w]hen . . . the People have already made it clear that the evidence will show the commission of an uncharged crime, and the defendant objects on grounds that the People have not shown that the evidence is relevant to any issue in the case" (*Clark, supra*, at p. 126.) Because the testimony regarding appellant's tattoos did not involve uncharged crimes, appellant's relevance objection to the evidence was insufficient to preserve his claims under Evidence Code sections 1101 and 352. (*Ibid.*)

individual, and in this case those words that we heard are consistent with violent gang activity. [¶] And we talked about a criminal street gang, that's—that involves the kind of conduct that's outlawed there in the criminal street gang statute. [¶] So yes, you may use that."

The trial court did not abuse its discretion in finding that the meaning of appellant's tattoos was relevant to prove the gang enhancement allegations, in that they showed his state of mind to be that of someone who was prepared to kill for his gang. (See *People v. Ochoa* (2001) 26 Cal.4th 398, 437-438, disapproved on another point as stated in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14 [murder defendant's "187" tattoo and gang expert's testimony explaining its meaning admissible to show defendant's admission of his conduct and consciousness of guilt]; see also *People v. Lindberg* (2008) 45 Cal.4th 1, 46-48 [evidence of meaning of tattoos properly admitted as relevant to prove intent and motive].) Moreover, exclusion was not compelled by Evidence Code section 352 because the evidence was not substantially more prejudicial than probative. While the probative value of the evidence was undermined by the fact it was never established that appellant even knew the meaning of the tattoos, the potential for prejudice is lessened for the same reason.

Appellant's due process claim is similarly unavailing. As we have noted, the tattoo evidence was relevant to prove appellant's state of mind, intent, and motive. Because the jury could draw permissible inferences from the evidence, there was no due process violation. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 70; *McKinney v. Rees*, *supra*, 993 F.2d at p. 1384.)

Even if the evidence was erroneously admitted, the error was harmless. The testimony regarding appellant's tattoos was vague and inconclusive. It was never established that appellant understood what the tattoos meant, and the translator acknowledged that the meaning of the two characters together could change based on the context. Moreover, the evidence of appellant's guilt included an eyewitness identification by one of his victims. That testimony is sufficient by itself to support appellant's

convictions. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) In light of the evidence, it is not reasonably probable that appellant would have enjoyed a more favorable result had the tattoo evidence been excluded. Any error in admitting the evidence was therefore harmless. (*People v. Watson, supra*, 46 Cal.2d at p. 836; *People v. Harris, supra*, 37 Cal.4th at p. 336.)

IV.

Sufficiency of the Evidence

Appellant contends the evidence is insufficient to support his convictions. We disagree.

In reviewing claims of insufficient evidence, "" . . . we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence-that is, evidence that is reasonable, credible, and of solid value-from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" [Citation.] ' . . . [W]e presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence.' [Citation.]" (*People v. Wilson* (2008) 44 Cal.4th 758, 806.) We may reverse a judgment for insufficient evidence only if it clearly appears from the entire record "that upon no hypothesis whatever is there sufficient evidence to support it." (*People v. Massie* (2006) 142 Cal.App.4th 365, 371.)

Appellant's attack on the sufficiency of the evidence is premised on the claim that no reasonable jury could have found that his identity as the shooter had been established beyond a reasonable doubt. There is simply no merit in this claim. As we have noted, one of appellant's victims positively identified him as the shooter, and that identification is sufficient to sustain his conviction. (*People v. Young, supra*, 34 Cal.4th at p. 1181.) Appellant was also identified by Officer Mixer as the passenger in the Acura, and his hat and cell phone were found in the vehicle. Appellant's attempt to undermine these identifications ignores the applicable standard of review, which requires

us to construe the evidence in the light most favorable to the judgment. Any weaknesses or inconsistencies in the eyewitnesses' testimony did not render their identifications of appellant insufficient as a matter of law, but rather were merely matters of weight to be decided by the jury. (See, e.g., *People v. Fagalilo* (1981) 123 Cal.App.3d 524, 530-531.) Appellant's claim of insufficient evidence fails.

V.

Cumulative Error

Appellant argues that the cumulative effect of the preceding errors combined to deprive him of a fair trial. Because we reject all four assignments of error, the claim necessarily fails. (*People v. Avila* (2006) 38 Cal.4th 491, 608.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.

William Pounders, Judge
Superior Court County of Los Angeles

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